

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 24, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUGO SANCHEZ-MERINO,

Defendant.

No. 4:19-cr-06065-SMJ-1

**ORDER DENYING
DEFENDANT'S SECOND
MOTION TO DISMISS**

Before the Court is Defendant's Second Motion to Dismiss, ECF No. 65. Defendant argues that the immigration courts that handled two of his previous removals did not have subject matter jurisdiction. This argument is clearly foreclosed by Ninth Circuit precedent. *See United States v. Bastide-Hernandez*, 3 F.4th 1193, 1196 (9th Cir. 2021). The Court thus denies the motion.

BACKGROUND

Defendant originally came to the United States from Mexico as a teenager and remained for fourteen years. *See* ECF No. 65-1 at 1. In 1997, when he was twenty-five, he was convicted of petty theft. ECF No. 64-4 at 3. Defendant has three siblings who live in the United States, including one who is a naturalized citizen and one who is a lawful permanent resident. ECF No. 64-1 at 2.

1 He has previously been removed three times, as detailed below. After that,
2 immigration authorities encountered Defendant in September 2019 when he was in
3 Benton County jail on pending charges, leading to the indictment in this case. ECF
4 No. 64-4 at 3.

5 **A. April 29, 2000 Expedited Removal (“First Removal”)**

6 On April 28, 2000, Defendant presented himself at the San Ysidro, California
7 port of entry, falsely claiming to be a U.S. citizen but presenting no supporting
8 documentation. ECF No. 64-2. At a secondary inspection, he admitted to being a
9 Mexican citizen and claimed to have been living in the United States for the past
10 fourteen years. *Id.* Immigration officials took him into custody and decided to
11 execute an expedited removal order. *Id.* Defendant was removed to Mexico on April
12 29, 2000, about eighteen hours after being taken into custody. ECF No. 64-1 at 4.

13 **B. May 2, 2000 Removal (“Second Removal”)**

14 The next day, April 30, 2000, Defendant again presented himself at the San
15 Ysidro port of entry, again claiming to be a U.S. citizen. ECF No. 65-2. Immigration
16 authorities served him with a Notice to Appear to initiate formal removal
17 proceedings before an immigration judge the same day. ECF No. 65-3.

18 The NTA listed his address as an immigration detention facility in San Diego.
19 *Id.* at 1 It alleged that he was removable as an arriving alien who was not in
20 possession of a valid entry document, because he falsely claimed to be a U.S. citizen.

1 *Id.* at 1. It directed him to appear for a removal hearing at an unspecified location
2 “to be set at a later date and time.” *Id.* at 1. The officer purportedly advised
3 Defendant of the time and place of his hearing. ECF No. 65 at 2–3.

4 That same day, the “Deferred Prosecution Office” served a notice on
5 Defendant that he would have a removal hearing at the “Executive Office of
6 Immigration Review” at a “later date and time.” ECF No. 65-4. This notice also
7 listed his address as the detention facility in San Diego. *Id.* It instructed Defendant
8 to “direct all mail to the immigration judge” to an address in San Diego. *Id.*
9 Defendant signed the notice, but there is no indication that it was translated into
10 Spanish. *Id.* Only one sentence (the certification of his address for receiving mail)
11 was translated on the form. *Id.* There is no indication Defendant ever received a
12 Notice of Hearing or other document advising him when the hearing would occur.¹
13 ECF No. 65-6.

14 Defendant appeared before an immigration judge on May 2, 2000. ECF No.
15 65-5. His proceedings lasted approximately seven minutes. ECF No. 66-6.
16 Defendant acknowledged receiving the NTA and agreed to continue without an

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18 ¹ The immigration judge advised the group that their hearings was set to occur a few
19 days later (either Thursday or Friday), but he had time to hear their cases that day
20 (a Tuesday) if they wished to proceed. The judge specifically advised all
respondents they would have to waive their right to receive a formal written notice
of their hearing date in order to proceed that day, then immediately advised if they
were ordered deported and did not appeal, they would be returned to Mexico that
same evening. ECF No. 66-6.

1 attorney. *Id.* He admitted to the allegations in the NTA. *Id.* The IJ ordered him
2 removed to Mexico. ECF No. 65-5. The written removal order, issued by an
3 immigration court in El Centro, California—not San Diego—merely notes that
4 Defendant made admissions that subjected him to removal and he “made no
5 applications for relief from removal.” ECF No. 65-5. He was removed to Mexico
6 that evening.² ECF No. 65 at 4.

7 **C. August 20, 2001 Removal (“Third Removal”)**

8 On August 12, 2001, Defendant again presented himself at the San Ysidro
9 port of entry, claiming to be a U.S. citizen and presenting a birth certificate bearing
10 someone else’s name ECF No. 65-7. Immigration officials served him with an NTA
11 to initiate removal proceedings. ECF No. 65-8. This NTA also listed the same
12 detention facility address in San Diego as his prior removal proceedings. *Id.* at 1.
13 The NTA directed him to appear before an immigration judge at an unspecified
14 location, date, and time.³ *Id.* Officials purportedly later advised Defendant of the
15 time and place of the hearing. ECF No. 65 at 5.

17 ² In July 2001, immigration authorities located Defendant in a California jail.
18 Defendant had apparently reentered the United States on May 3, 2000 (the next
19 day). Defendant was removed again on July 23, 2001 under the May 2, 2000
20 removal order. ECF No. 75-1.

³ While there is a stamp from an immigration court in San Diego (without any
address) dated August 15, 2001, on the face of one copy of the NTA, there is no
indication that anyone ever advised Defendant where his removal hearing would
occur. *See* ECF No. 65-8.

1 Five days later, on August 17, 2001, immigration officials served
2 Defendant—through a custodial officer—with a Notice of Hearing (“NOH”). ECF
3 No. 65-9. There is no evidence that Defendant received it. *See* ECF No. 65 at 5. The
4 NOH advised that his removal hearing would occur on August 20, 2001 at the
5 detention facility that he was housed at, on Front Street in San Diego. ECF No. 65-
6 9. But the NOH also directed Defendant to file any motions, applications, or other
7 correspondence with an immigration court on West A Street in San Diego. *Id.*

8 Defendant appeared for a removal hearing on August 20, 2001, where the
9 immigration judge ordered him removed to Mexico. ECF No. 65-10. For most of
10 the hearing, the immigration judge spoke to a group of respondents as a whole. ECF
11 No. 67-5. Defendant’s individual interaction with the immigration judge lasted
12 about three minutes. *Id.* He waived his right to counsel and admitted the allegations
13 in the NTA. *Id.* The written removal order, issued by an immigration court on West
14 A Street in San Diego, states only that Defendant made admissions that subjected
15 him to removal and he “made no applications for relief from removal.” ECF No.
16 65-10. Defendant waived his appeal. *Id.* He was removed to Mexico the next day.
17 ECF No. 65 at 6.

18 DISCUSSION

19 Defendant argues that because the NTAs provided to him before his Second
20 and Third Removals did not list the time and place of his removal hearing, subject

1 matter jurisdiction never vested with the immigration court. ECF No. 65 at 1. This
2 argument was foreclosed by the Ninth Circuit in *Bastide-Hernandez*.

3 Defendant contends that a recent Supreme Court case supersedes *Bastide-*
4 *Hernandez* and requires this Court to reach a different result. ECF No. 65 at 7 (citing
5 *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)). This Court disagrees. *Bastide-*
6 *Hernandez* and *Niz-Chavez* are not “clearly irreconcilable,” so this Court must
7 follow the directive of the Ninth Circuit. *See Miller v. Gammie*, 335 F.3d 889, 900
8 (9th Cir. 2003) (Circuit precedent is overruled where “intervening Supreme Court
9 authority is clearly irreconcilable”); *see also United States v. Sanchez*, 853 F. App’x
10 201, 202–03 (holding *Niz-Chavez* is not clearly irreconcilable with *Bastide-*
11 *Hernandez* and *Karingithi* on this issue).

12 On April 29, 2021, the Supreme Court issued its decision in *Niz-Chavez*,
13 holding that Illegal Immigration Reform and Immigrant Responsibility Act of 1996
14 (IIRIRA)’s definition of “a” notice to appear required that the government furnish a
15 *single* compliant document in order to invoke the stop-time rule.⁴ Often,—like in
16 this case—the government will issue an initial “Notice to Appear” which does not
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18 ⁴ Originally, a noncitizen continued to accrue time toward the presence requirement
19 during removal proceedings. The IIRIRA responded to concerns that this could
20 encourage noncitizens to delay proceedings by creating the stop time rule, which
deems that time stops accruing toward the presence requirement “when the alien is
served a notice to appear.” *See Niz-Chavez*, 141 S. Ct. at 1478–79 (quoting 8 U.S.C.
§ 1229b(d)(1)).

1 include a time or location of a hearing, and then will supplement that initial
2 document with “piecemeal” additional documents or verbal dissemination of
3 information. *See Niz-Chavez*, 141 S. Ct. at 1479. The majority analyzed the text of
4 the statute, emphasizing that it frequently referred to “a” notice to appear, which, by
5 its plain meaning, refers to a single document.

6 On July 12, 2021, the Ninth Circuit issued its amended opinion in *Bastide-*
7 *Hernandez*.⁵ The Ninth Circuit held that when a Notice to Appear is filed,
8 jurisdiction vests with the immigration court, regardless of its compliance. *Bastide-*
9 *Hernandez*, 3 F.4th at 1196 (“[T]he jurisdiction of the immigration court vests upon
10 the filing of an NTA, even one that does not at that time inform the alien of the time,
11 date, and location of the hearing. If this were not the case, upon the filing of an NTA
12 jurisdiction would vest, but then would unvest if the NTA lacked required time,
13 date, and location information, only to once again revest if a subsequent curative
14 NOH provided that missing information. Jurisdiction is not so malleable.
15 Jurisdiction, for all its subtle complexities, is not ephemeral. It either exists or it
16 does not.”).

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19 ⁵ The initial opinion was issued on February 2, 2021, before *Niz-Chavez* was
20 decided. *United States v. Bastide-Hernandez*, 986 F.3d 1245 (9th Cir. 2021).
Bastide Hernandez moved for a rehearing, and both parties filed additional briefing
regarding the new case law. The amended opinion does not mention *Niz-Chavez*.

1 Unlike *Niz-Chavez*, which focuses on interpretation of the statute, *Bastide-*
2 *Hernandez* looks to the regulations to determine when jurisdiction vests. 8 C.F.R. §
3 1003.14(a) states that “[j]urisdiction vests, and proceedings before an Immigration
4 Judge commence, when a charging document is filed with the Immigration Court
5 by the Service.” A “charging document” is “the written instrument which initiates
6 a proceeding before an Immigration Judge. . . . [including] a Notice to Appear.” 8
7 C.F.R. § 1003.13. Both the statute and the regulations use the article “a” to quantify
8 “notice to appear.” *See* 8 C.F.R. § 1003.13; 8 U.S.C. § 1229. Neither Section
9 1003.13 nor 1003.14 reference the statute, much less the statute’s definition of
10 “Notice to Appear.”

11 *Niz-Chavez* interprets the statute. *Bastide-Hernandez* interprets the
12 regulations. *Niz-Chavez* does not mention the word “jurisdiction.” *Bastide-*
13 *Hernandez* analyzes jurisdiction specifically. A rule is jurisdictional only “[i]f the
14 Legislature clearly states that a threshold limitation on a statute’s scope shall count
15 as jurisdictional.” *Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012) (alteration in
16 original) (internal quotation omitted). The Ninth Circuit implicitly rejected
17 Defendant’s argument that the NTA requirements in the IIRIRA were jurisdictional.
18 It chose to amend its opinion after receiving supplemental briefing but did not
19 change that portion of its opinion. The Ninth Circuit clearly interpreted *Niz-Chavez*
20 more narrowly than would Defendant. Whether the Ninth Circuit would limit *Niz-*

1 *Chavez* to the stop-time rule or construe it more broadly is immaterial; what matters
2 is that the Ninth Circuit would hold that the stricter interpretation of “a” Notice to
3 Appear does not directly apply to the regulation regarding jurisdiction and does not
4 prevent jurisdiction from vesting with the immigration court in cases such as this,
5 where an NTA does not contain all the required information.

6 Defendant asks this Court to look to the regulations to determine jurisdiction,
7 and that is exactly what the Court should do. *See* ECF No. 65 at 13 (citing *Karingithi*
8 *v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) (“the regulations, not § 1229(a),
9 define when jurisdiction vests.”). Taking the regulations at face value, they allow
10 jurisdiction to vest as soon as “a” Notice to Appear is filed, not when a *compliant*
11 Notice to Appear is filed. *See* 8 C.F.R. §§ 1003.13, 1003.14.

12 *Bastide-Hernandez* can be reconciled with *Niz-Chavez*. This Court thus *must*
13 find that the immigration court had jurisdiction and deny the motion to dismiss. As
14 both parties admit, *Bastide-Hernandez* is directly on point. Because Defendant was
15 issued NTAs for both removals, there was jurisdiction.

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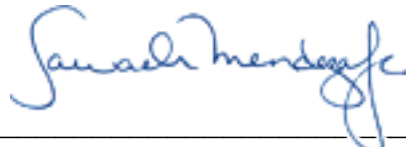
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1 Accordingly, **IT IS HEREBY ORDERED:**

2 Defendant's Second Motion to Dismiss, **ECF No. 65**, is **DENIED**.

3 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
4 provide copies to all counsel, the U.S. Probation Office, and the U.S. Marshals
5 Service.

6 **DATED** this 24th day of September 2021.

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8 SALVADOR MENDOZA, JR.
9 United States District Judge